Original

No. 8587-8588

IN THE

SUPREME COURT,

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents.

PETITION FOR RE-HEARING.

By STEWART & HERRIN, Attorneys for

Fresno Canal and Irrigation Co., Fowler Switch Canal and Irrigation Co., Libery Ditch Co., King's River and Fresno Canal Co., *Fresno County.*

Seventy-Six Land and Water Co., *Fresno and Tulare Counties.*

Merced Canal and Irrigation Co., *Merced County.*

Lakeside Ditch Co., Kaweah Canal and Irrigation Co, Timothy Page, Geo H. Castle and J. Wood, owners of Packwood Canal, *Tulare County.*

Riverside Land and Irrigating Co., Riverside Canal Co, *San Bernardino County.*

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John H. McBride *Clerk.*

By J. S. Kilby *Deputy Clerk.*

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We respectfully ask leave of this Court to present for its consideration the following petition for rehearing in this cause.

The final judgment in this case will establish one of the most important rules of property in this State.

The question involved is one vital to the inhabitants of the arid sections of California. If

what is commonly known as the law of "appropriation" be held to govern the ownership and use of water in these sections, their advancement and continued prosperity is secured; but if it be held that such ownership and use is governed by the riparian law of England as construed by this Court, great permanent injury must necessarily result to these sections of the State.

The interests of the parties to this cause, which will be affected by the final judgment herein, are therefore very small when compared with the interests which the principle established must control and effect; and the fact that the judgment pronounced by the majority of the Court threatens serious injury to the interests of many, not parties to this cause—among them the persons for whom we appear—is an urgent reason why the fullest hearing and consideration should be given by this Court of the questions involved.

We believe, and shall attempt to show, that the law governing the ownership and use of water in this State is well adapted to the necessities and wants of the people in its different sections—that there is no conflict between the law and the interests of any section of the State—on the contrary, that such interests, though diversified, are fully protected and fostered by this law.

If the law so exists, we know this Court will readily declare it, and to that end we believe the Court will entertain every suggestion which can be made in favor of such result.

I.

Two prominent facts appear from the statute governing water rights in this State. 1. That it provides a complete law for the appropriation and diversion of water from the natural streams; and 2. That it recognizes and protects riparian rights.* This statute should not be construed so as to nullify the sections providing for appropriation, nor the provision protecting riparian rights.

We must, if possible, give each and every part of the statute effect. Any argument which violates this first principle of statutory construction is *prima facie* unsound.

The difficulty in construing this statute arises from the fact that the right of appropriation cannot exist upon the same stream with "riparian" rights; so that if it be said that riparian owners upon all the streams in this State have in the waters of such streams the same rights as ripa-

*Section 1422 Civil Code declares that the rights of riparian proprietors are not affected by the preceding 12 sections of the Code providing for rights to water by appropriation.

rian owners have in England, we must conclude that the right of appropriation does not exist in this State—that the statute providing for such right is a dead letter. There is no escape from this result if the riparian law of England is enforced in all parts of this State, and construed as requiring the same uses of water in California as in England. We can not establish the right of appropriation anywhere (except by prescription) unless we admit that such riparian law is abrogated, or exists only in a modified form.

We say that a construction of this Statute which nullifies the law of appropriation is just as unsound as one which nullifies the clause protecting riparian rights.

The question therefore is, can this Statute be reasonably construed so as to give each part its legitimate effect?

From what we have said, it is obvious that such construction cannot be reached unless there are streams in this State upon which "riparian" rights do not exist. (By riparian rights we mean the rights of a riparian owner in England, and in this division [I] of our argument, we use the word "riparian" with this meaning). On the other hand, there must be streams upon which riparian rights do exist.

Can we accordingly classify the streams in this State as riparian and non-riparian? If so, we

can give the Statute the reasonable construction for which we contend.

A stream upon which the necessity for appropriation does not exist—where its water is best utilized by the same uses which are made of water in England—would naturally be a riparian stream. On the contrary, where no beneficial use of the waters of a stream can be had, except under the law of appropriation, such stream would naturally be non-riparian.

Under this description, we find both riparian and non-riparian streams in this State; some of these streams having, as to surrounding moisture and dampness, climatic conditions quite similar to England, while other streams in the State exist in climatic conditions entirely similar to that of Egypt, or that portion of the Great Sahara Desert bordering on the rich valleys of Northern Africa.

The State of California is nearly one thousand miles in length. In its southern portion, the climate is one of the most arid, with an annual rainfall of but few inches, generally less than ten, in many places less than five; while in its northern section, adjoining Oregon, the country is moist, having generally an annual rainfall of from seventy to one hundred inches, and in places exceeding one hundred inches. The country west of the Coast Range, from Cape Mendocino north-

ward to the Oregon line, is quite as moist a country as England. Any one who has made the trip by ocean steamer from San Francisco to Portland has observed the change in the climatic conditions north of Cape Mendocino, and that the coast of California northward from Cape Mendocino, is entirely similar to the coast of Oregon.

In the country southward from the latitude of Cape Mendocino, a rapid decrease of rainfall occurs; from forty-two inches annual rainfall at Redding, there are only twenty-four inches at Red Bluffs, twenty-four miles to the southward. At Sacramento nineteen inches measures the annual rainfall; at Stockton sixteen inches. Thence southward the rainfall decreases to a mean of ten inches, as found at Merced; seven inches at Fresno, and four inches at Bakersfield. Southward from Cape Mendocino along the Coast, the rainfall is much greater than in the opposite portions of the interior of the State. An annual rainfall of twenty inches, extends in its southern limit to the most southerly portion of the counties of Sonoma, Napa and Marin. Southward of San Francisco, again, there is an annual rainfall of from thirteen to sixteen inches, including the western Santa Clara Valley, the Santa Cruz Mountains, Monterey Bay to the lower Salinas Valley.

These facts, together with much pertinent information, may be found in a report upon the

Physical and Agricultural Features of California, prepared by E. W. Hilgard, Professor of Agriculture in the University of California, a copy of which report we present to the Court for reference. (See page 11 and the following pages of this report.)

Dividing the State into sections, we would say that irrigation is indispensable to the successful cultivation of crops in nearly all the country south of Stockton. From Stockton to Red Bluff, crops may be cultivated with or without irrigation, which may be useful but is not indispensable in this section. In the country north of Red Bluff, little or no irrigation is practiced, and its utility for raising crops is questionable. From Monterey along the coast to the Oregon line, irrigation is unnecessary.

We find, therefore, that portions of California have climatic conditions quite similar to those of England. In these sections of the State riparian rights naturally exist. Such rights secure to the people the most beneficial use of the waters.

We find other portions of the State in which irrigation is absolutely necessary to the raising of crops. Without the right of appropriating and diverting the waters of the streams, these sections of the State cannot be developed or inhabited.

To enforce the riparian law of England, as it is

construed by the Court, in these sections would be utterly destructive.

In view of these facts, is there any reason why the statute in question should not be construed as protecting riparian rights where such rights naturally exist, and as protecting the right of appropriation where it is necessary and indispensable to the occupation and development of the country? We say the law can, and should be so construed.

If it be urged against this construction that it could not be readily determined in all cases which law is applicable to the stream in dispute, we answer:

1. That this question must be determined by the Court or jury in each case according to its special facts and conditions. In each case the question would be as to the reasonableness of the use. Whether or not a use under the riparian law would be more reasonable than a use under the law of appropriation, and *vice versa*, would be the question involved in every case. The Courts and juries of the different counties of the State would settle this question for the best and paramount interests of their different localities.

2. We say that in nearly all parts of the State the climatic conditions are so marked, and so

well defined that there would be no difficulty in determining which law was applicable. In fact, this question has already been determined in different sections of the State. In Northern California irrigation is not practiced to any considerable extent; in many places not at all; while in the southern portion of the State large and extensive systems of irrigation have been carried out, and are now in successful operation; not only appropriating the available running water, but such additional water as can be secured by development and storage in reservoirs.

From the facts disclosed in the record of this case, there can be no doubt of the law of appropriation being perfectly adapted to the locality in question, while to hold that "riparian" rights exist would practically desolate many thousands of acres of land now in successful cultivation.

The objection, therefore, that under this construction of the law, its administration would be impracticable is not well founded.

In construing this law, we must presume that it was enacted with reference to the climatic conditions and necessities of the different sections of the State. The subject-matter upon which the law was to operate was undoubtedly considered by the law-maker, and must be considered by

the Court in arriving at a true construction of the law. That the right of appropriation and riparian rights could not co-exist in the same locality was certainly understood; therefore the law did not contemplate this impossibility, but we find the right of appropriation expressly provided for. This was futile if riparian rights existed throughout the State.

In view of the fact that in more than one-half of the State the ordinary and beneficial uses of water were incompatible with "riparian" rights, the Legislature extended over this part of the State the law of appropriation — one exactly adapted to its conditions and necessities. At the same time, as in other parts of the State, riparian rights naturally existed—the use of water there being similar to that in England, it was necessary to protect riparian rights in such localities; hence the saving clause contained in Section 1422 of the Civil Code.

II.

But it is said that the right of a riparian owner must be, and is the same in all parts of the State —that such owner, wherever his property, has the same rights as are held by riparian owners in England.

That this assumption is entirely incorrect is ap-

parent when we consider the source and reason of the riparian law of England.

The rights of the riparian owner in England were determined with reference to the climatic and other conditions surrounding his land. The annual rainfall in England is from 30 to 80 inches, and this rainfall assisted by heavy fogs makes the land moist, often swampy, and requiring drainage. Irrigation is neither necessary nor beneficial. Under these conditions the Judges of England fixed the rights of the land owners along the stream. These rights to the water of the stream are well stated in Gould on Waters, Sec. 205, as follows:

"Each riparian proprietor has a right to the *ordinary* use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for his domestic purposes and for his stock. For these purposes, by the weight of authority, he may, if necessary, consume all the water of the stream. He has also the right to use it for any other purpose, as for irrigation or manufactures; but this right to the *extraordinary* use of the water is inferior to the right to its ordinary use; and if the water of the stream is barely sufficient to answer the natural wants of the different proprietors, none of them can use the water for such extraordinary purposes as irrigation or manufactures."

The rights of the riparian proprietor to the water of a stream is therefore measured under the law of England by the *ordinary* uses to which such water is put in the locality of such stream.

These ordinary uses must be supplied before the water can be appropriated to an *extraordinary* use. Whether or not a certain use is *ordinary*, depends upon the *natural wants and conditions* of the particular locality, not upon any inflexible rule of law

Therefore, if a use which is *ordinary* upon one stream be extraordinary upon another, such use would in the one case be sanctioned by the law, while in the other it would be prohibited until the ordinary uses along the stream were supplied. We must reach this conclusion if we consider the reason upon which the doctrine of the law was based.

We therefore say that the doctrine of the riparian law of England, when properly applied in the light of its reason to cases arising in the San Joaquin Valley, would fully sustain the right of appropriation for irrigating purposes, because such appropriation is *one of the most ordinary uses* of water in that valley.

The true principle of the English law is, therefore, that riparian proprietors are first entitled to take from the stream sufficient water for their *ordinary* uses before such water can be applied to an *extraordinary* use.

Now can it be doubted that if the San Joaquin Valley was a part of English territory over which this law extended, that the ordinary use of water

for irrigation in such valley would be upheld in the English Courts.

We submit that the Courts would not prohibit the ordinary use of water for irrigation in the San Joaquin Valley merely because such use is not ordinary in England proper.

We must therefore conclude that the Courts would protect the ordinary use of water in all localities; such uses to be determined in each locality by its special conditions.

An English decision requiring or prohibiting a particular use of water upon the facts of an English case, is no authority for or against the *same use* of water in a California case resting upon entirely different facts.

Chancellor Kent said that—

> "Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel and the labor of judges are continually required in the study of the reports in order to understand accurately their import and the principles they establish."

1 Kent Comm. Star page 473.

There is no analogy of fact between a case arising in foggy England with its thirty and more inches of annual rainfall, and a case arising in arid Kern county, with its four inches of rainfall, where irrigation is indispensable to cultivation.

A moment's reflection will show that the right to have the water of a stream flow in its natural channel cannot be universal, or a natural right; on the contrary, more than three-fourths of the people who have inhabited the earth, have found it necessary, in order to sustain life, to irrigate their lands, and have diverted the water of the streams and distributed it over all the land commanded by the flow of such streams.

Contemplate for a moment the enforcement of "riparian" rights in Eastern and Western Africa, Eastern and Southern Asia, Italy, Spain, Arizona, Sonora, Sinaloa, or Southern California.

In all these countries, agriculture has been prosecuted by irrigation from the earliest history. In fact, irrigation existed in all of them in prehistoric times, as the remains of ancient ditches, canals, and water works bear testimony.

(For the general facts concerning irrigation and its history, see article on irrigation in the Encyclopædia Brittanica.)

When the United States acquired California, the agricultural pursuits in the southern portion of the State were exclusively carried on by irrigation. No agricultural crop can be successfully raised in Southern California or Arizona without irrigation.

In Arizona, we find the remains of extensive

canals and reservoirs constructed for irrigating purposes, long prior to the Spanish acquisition of the country.

It seems to us, therefore, an error to suppose that riparian rights, as contended for by the appellants, ever existed under the laws of Spain or Mexico, or that the owner of a Mexican grant in California has any more or different rights than has the owner of adjoining land purchased from the United States.

The law of appropriation prevailed in California while it was Mexican Territory, and must prevail in the irrigating section, if the law of nature is not utterly disregarded.

We think there is no instance in any civilized country where running streams are not used by the people in the manner best suited to their natural wants.

Is it possible that California is to furnish the first instance where the laws created by man are so radically in conflict with the laws of nature as to render it impossible to utilize the resources of the country.

Whatever may be decided now; however much the progress of the State may be delayed by the enforcement of arbitrary rules, the time must and will come when all the water in the irrigating section of the State will be utilized to the fullest

extent. "Unsettled questions have no pity for the repose of mankind."

So long as there is an acre of land barren for want of irrigation, and an inch of water running to waste, the contest between the appropriator and the sluggard must continue.

The very short time we have had in which to prepare this petition, has made it utterly impossible to present our views as fully and accurately as we would desire.

We have appeared in this case on behalf of the owners of property interests aggregating in value several millions of dollars, which must be affected favorably or unfavorably by the final judgment of the Court herein.

We earnestly hope that a re-hearing will be granted in this case.

Respectfully submitted,

STEWART & HERRIN,
Attorneys for Fresno Canal and Irrigation Co., and others.